



FEDERAL PRACTICE INSTITUTE
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ISSUES FOR THE NEWER PRACTITIONER

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Pretrial Statement

Like many facets of court-mandated trial preparation, the pretrial statement may be assigned to the newer practitioner on the trial team. In addition to any specifics ordered by your trial judge, Federal Rule of Civil Procedure 26(a)(3) and Local Rule 16.2 govern the timing and the contents of the pretrial statement. It will be helpful to the novice to review pretrial statements filed in previous cases, but you should not neglect a careful review of the applicable rules.

Fed. R. Civ. P. 26(a)(3) provides:

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

Local Rule 16.2 provides:

16.2 Final Pretrial Statements

(a) Contents

Final pretrial statements shall be filed in accordance with Fed. R. Civ. P. 26(a)(3) and, in addition to the requirements of that rule, shall contain:

(1) a brief statement of the case assented to by all parties, except assent shall not be required in cases in which one or more of the parties is an incarcerated pro se litigant;

(2) the name of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises, and the parties shall simultaneously exchange between themselves the address and telephone number for each listed witness;

(3) a written waiver of claims or defenses, if any;

(4) a list of all depositions which may be read into evidence, with page/line designations filed ten (10) days prior to trial, counter-designations filed five (5) days prior to trial, and objections filed two (2) days prior to trial;

(5) a list of all exhibits to be offered at trial separately identifying those which the party expects to offer and those which the party may offer if the need arises. Exhibits intended to be used solely for impeachment need not be listed;

(6) a statement confirming that the parties have met and conferred on whether they intend to have the jury use the Jury Evidence Recording System (JERS) to review evidence and their respective positions on the use of JERS;

(7) an itemized statement of special damages;

(8) except in actions tried without a jury, a statement of the latest demand and offer, and a statement describing the parties' participation in any alternative dispute resolution process;

(9) a statement of a claim for attorney's fees, if applicable, with citation to the statutory and/or regulatory authorities relied upon as the basis for the claim;

(10) any requests for a view pursuant to LR 39.3, and a designation as to who shall pay the cost of the view in the first instance; and

(11) an estimate of the length of trial.

(b) Documents to Accompany Final Pretrial Statements

The following documents shall be filed simultaneously as separate documents with each party's final pretrial statement:

(1) Requests for Jury Instructions

Requested jury instructions shall cover the elements of all claims and defenses raised in the case and any unusual issues that may arise in the case that will warrant a special instruction. Instructions such as the role of the jury, evaluating witness credibility, burden of proof, and other instructions routinely given by the court are not to be included. Parties may file supplemental requests at the close of the evidence or at such earlier time during trial as the court reasonably directs.

(2) Trial Memoranda and Requests for Findings of Fact and Rulings of Law

In all actions tried upon the facts without a jury or with an advisory jury, the parties shall file memoranda of law and requests for findings of fact and rulings of law with their final pretrial statements. The parties may file supplemental requests and/or further memoranda at such time as the court directs.

Requests for findings of fact shall concern only facts that are genuinely disputed and material to the outcome of the case. Such requests shall be set forth in chronological order in separately numbered paragraphs. Proposed rulings of law shall be set forth in separately numbered paragraphs and contain brief citations to supporting authority.

(3) Motions in Limine

(4) Voir Dire Requests

(5) Proof of Special Damages

The defendant shall notify the plaintiff if it requires testimonial proof of special damages.

(6) Use of JERS

To the extent at least one but not all parties would like to present evidence electronically to the jury during deliberations using the Jury Evidence Recording System (JERS), the party who desires to use JERS shall file a motion requesting leave to do so.

(c) Duty to Update

If a case is continued after the parties have filed final pretrial statements, the parties shall either update their final pretrial statements or file a stipulation that no change is necessary no later than ten (10) days prior to the new final pretrial conference.

(d) Objections

In addition to objections in Fed. R. Civ. P. 26(a)(3), objections to exhibits, motions in limine, proposed jury instructions, and proposed findings of fact and rulings of law shall be filed no later than fourteen (14) days after the service of the final pretrial statements in accordance with this rule.

Because the pretrial statement will often be the responsibility of the junior attorney on the case, it is important to be aware of the components that will require you to invest time prior to the filing deadline. Too many newer attorneys have been caught off-guard by these requirements at the eleventh hour. As difficult as it may be in some cases to refine and submit your witness and exhibit lists, these alone will not satisfy the pretrial statement's requirements. For instance:

- You will need to create a statement of the case to which all parties assent. This may take more than a few days of conversations and revisions.
- You must designate the pages and lines of the portions of depositions you intend to read into evidence.
- The parties are required to meet and confer about using the Jury Evidence Recording System (JERS) during the trial.
- With the pretrial statement, you must submit your proposed jury instructions, motions in limine, proposed voir dire, and a motion to use JERS (if all parties do not assent to using JERS).

Just as importantly, you should anticipate any issues you may have with the pretrial statement, witness list, and exhibits submitted by the opposing party. You are required to file your objections within 14 days. If objections to exhibits and witnesses (except those under Fed. R. Ev. 402 & 403) are not made 14 days after the opposing party files their pretrial statement those objections are waived.

A sample pretrial statement is attached for your reference.

Pretrial Motions and Jury Instructions

Pursuant to Local Rule 16.2 motions in limine and requests for specific jury instructions are due on the same day as the pretrial statement. Whether to file such motions and what form they should take are frequently matters of strategy. You should start thinking about evidentiary and legal issues well in advance of the due date so that you have time to discuss your approach with the entire trial team.

Motions in limine ask the court to make preliminary rulings on evidentiary issues. They typically ask the court to exclude certain witnesses, testimony, or exhibits from the trial. Sometimes it makes sense to file a motion in limine seeking a ruling that certain evidence is admissible so that you know, in advance of trial, whether you will be able to use it.

Motions in limine should be filed as separate motions. See Local Rule 7.1(a)(1) ("Filers shall not combine multiple motions seeking separate and distinct relief into a single filing. Separate motions must be filed."). Most motions in limine consist of a motion and

a memorandum of law. Occasionally, you will need to further support the motion with an affidavit or offer of proof.

Federal courts frequently abstain from ruling on motions in limine before trial unless the evidence is clearly inadmissible as a matter of law. If the evidence can be rehabilitated by laying a proper foundation or by showing that it falls within an exception to an exclusionary rule, the court will likely wait to rule until you or your opposing party seeks to use the evidence at trial. Nonetheless, it may be in your best interest to file motions in limine. First, motions in limine give you an opportunity to preview an evidentiary issue for the court so that the caselaw and your analysis has already been considered before the issue crops up during trial. Second, a pretrial ruling on a key piece of evidence may change the settlement posture of the case prior to jury selection. Third, motions in limine on purely legal issues can help set up and preserve certain issues for appeal.

Motions in limine are not the only method of making pretrial objections to the admissibility of the opposing party's evidence. Under Fed. R. Civ. P. 26(a)(3), you are required to make any objections to exhibits and use of depositions within 14 days of the parties' pretrial disclosure, unless your objection is based only on relevance. If you fail to object at that time, you have waived the objection unless the court excuses you for good cause.

A sample motion in limine and the corresponding court ruling is attached for your reference.

Local Rule 16.2 contemplates that the parties will submit requests for specific jury instructions with their pretrial statements. You are expected to request instructions that will "cover the elements of all claims and defenses raised in the case and any unusual issues that may arise in the case that will warrant a special instruction." LR 16.2. However, "[i]nstructions such as the role of the jury, evaluating witness credibility, burden of proof, and other instructions routinely given by the court are not to be included." *Id.* It is important to know from the outset that you are not expected to reinvent the wheel when it comes to jury instructions. Not only is it alright to use the NH Model Civil Jury Instructions, but some judges will not consider using your unique language if the model instruction would suffice. Only distinctive issues of law require you to write your own instructions. The NH Model Civil Jury Instructions are also organized by subject matter so they are a good way to make sure that you are providing requests for all necessary instructions.

Whenever possible, you should try to agree on language with the opposing party prior to submitting any requests for instructions. Even if you do not agree prior to submission, the judge may refuse to consider your requests until you attempt to do so.

The best source for jury instructions may be your judge's instructions in previous cases. Opposing counsel's requests for jury instructions in prior cases may also provide you with language that could lead to an assented request in your case. Use PACER to

search for both. You can access PACER through the NH District Court's website at: <http://www.nhd.uscourts.gov/access-case-files>. You can also search USDC-DNH opinions by keywords, names, or phrases through a tool offered on the same page.